

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

BLUE MAN VEGAS, LLC,¹

Employer

and

Case 28-RC-6440

**INTERNATIONAL ALLIANCE
OF THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES AND ITS TERRITORIES
AND CANADA, LOCAL 720, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO (Petitioner), seeks an election in a unit comprised of all full-time and regular part-time stagehand and wardrobe employees employed by the Employer in Las Vegas, Nevada. The Petitioner seeks by its petition, amended at hearing, to include in the unit all employees, including Heads of Departments (HODs), in the following departments: audio, carpentry, electrics, properties, video, and wardrobe. Contrary to the Petitioner, the Employer urges that any unit found appropriate must exclude the HODs because they are supervisors within the meaning of Section 2(11) of the Act. Further, the Employer contends, contrary to the Petitioner, that six employees employed as Music Instrument Technicians (MITs) should be included in any unit found appropriate. The units proposed by the Petitioner and the Employer, respectively, would each consist of approximately 39 employees.

Based upon the reasons more fully set forth below, I find that the unit sought, excluding the HODs, is appropriate for collective bargaining. I conclude that the HODs are supervisors within the meaning of Section 2(11) of the Act and, thus, should be excluded from the unit found appropriate herein. I also find that stagehand and wardrobe employees constitute a distinct and appropriate unit separate and apart from the MITs, and that the MITs' work is strongly integrated with that of the musicians. In these circumstances, I find that the MITs' exclusion from the unit sought by the Petitioner would be appropriate.

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Petitioner appears as corrected at the hearing.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. **Hearing and Procedures:** The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. **Jurisdiction:** The parties stipulated that the Employer, Blue Man Vegas, LLC, a Delaware Corporation, with a place of business in Las Vegas, Nevada, is engaged in the business of providing live entertainment. During the 12-month period preceding the hearing in this matter, the Employer derived gross revenues in excess of \$500,000, and purchased and received at its Las Vegas, Nevada place of business goods and materials valued in excess of \$5,000 directly from sources outside the State of Nevada. The Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. **Claim of Representation:** The parties stipulated that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding:** This case presents two issues. First, whether department heads are properly included in the unit sought by the Petitioner or should be excluded as supervisors within the meaning of Section 2(11) of the Act. Second, whether any unit found appropriate must include MITs. To provide a context for my discussion of these issues, I will present the record facts regarding the Employer's operations and background, its supervisory and organizational structure, the duties and responsibilities of the HODs, and the terms and conditions of employment for the Employer's stagehand, wardrobe, and MIT employees. I will then present the case law and analysis that supports my conclusions on these issues. At the outset, I note that the parties stipulated that there is no collective-bargaining history.³

A. The Employer's Operations and Background

Founded by three New York artists in the late 1980s, the Blue Man Group now produces shows in several cities internationally, including one in Las Vegas, Nevada. The Las Vegas show opened in 2000, and the Employer was formed for this purpose. From 2000

³ In its brief, the Employer renewed its motion to exclude all evidence related to the Petitioner's relationship with the Luxor Las Vegas Resort Hotel and Casino as irrelevant. After careful consideration, I hereby affirm the Hearing Officer's denial of the Employer's motion as the evidence goes to the background of the Employer's operations.

to September 15, 2005, the Employer staged its show at the Luxor Las Vegas Resort Hotel and Casino (Luxor). On October 4, 2005, the Employer moved its show to the Venetian Hotel and Casino (Venetian). Despite the change in venue, the show's essential nature has remained the same. It continues to feature three bald, blue men and seven musician/performers dressed in costume and make-up. These individuals perform on a stage, in a loft, or on a device known as the "matrix." The show consists of live music, video imagery, skits, and choreographed dance routines.

Lee Ann Groff is the Employer's Resident General Manager and has held this position for the past five years. As the Resident General Manager, Groff is the person in overall charge of the Employer's operations. She oversees the Employer's marketing, sales, and human resources functions, and serves as the "outward face" of the Employer by attending meetings with casino executives. Since the Employer opened at the Venetian, Groff has been present for fewer than 15 shows.

Reporting directly to Groff is the Employer's Production Supervisor, Kori Prior. As the Production Supervisor, a position she has held since April 2005, Prior is responsible for all elements of the production, including stage management and artistic issues. Prior directly supervises the Production Manager, John "Five" McInnis; the Production Stage Manager, Jennifer Holland; and the Resident Director, Matthew Banks.

1. The Employer's Operations at the Luxor

When the Employer staged its show at the Luxor, it did not directly employ the stage crew members. Rather, the stage crew was provided by the Luxor under the terms and conditions of a pre-existing contract between the Luxor and the Petitioner. Thus, the Luxor paid the stage crew and determined their benefits, and billed these amounts to the Employer. The Luxor also handled matters relating to the stage crew's management and discipline, with some limited input from the Employer.

Unlike the stage crew members, the Employer directly employed the MITs at the Luxor. This direct employment occurred because the contract between the Luxor and the Petitioner did not contemplate a stage crew that could maintain and repair the types of instruments used by the performers. As a result, the Employer created the MIT position to support the performers during the performance and to maintain and repair their instruments as needed. While three MITs happen to have backgrounds as musicians, they are not required to have any specialized degree or musical training.

2. The Employer's Operations at the Venetian

In 2005, the Employer decided to move its show from the Luxor to the Venetian. The Employer based this decision on several factors, including marketing and financial considerations. The record also reflects that, in addition to these economic factors, the Employer desired to exercise greater control over the selection and management of its stage crew. In this regard, the record shows that the Employer wanted to compel these employees to embrace its core values, such as teamwork, collaboration, and pre-show "circle meetings"

during which employees at all levels “get[] together and really put[] their mind toward that production for the evening.”

In conjunction with the move from the Luxor to the Venetian, the Employer created several new positions. It created the position of Technical Supervisor to oversee the electric, carpentry, property, audio, video, and wardrobe departments. This position serves to facilitate communications among the different stage crew departments and coordinate their functions. The Employer hired Tom Studer to fill this position. The record reflects that, while Studer has general experience as a production manager in other industries, he lacks previous work experience in Las Vegas and does not have significant technical expertise with respect to any of the specific functions performed by employees in the electric, carpentry, property, audio, video, or wardrobe departments. Studer reports directly to McInnis. He typically works from 10:00 a.m. to 7:00 p.m., Monday through Friday, and is seldom present for the performances.

The Employer also created the Head of Department (HOD) positions for the electric, carpentry, property, audio, video, and wardrobe departments. These positions, which report directly to Studer, were filled by Mical Goldzweig, Brian Lea,⁴ Anthony “T-bone” Vergot, Matt Koenig, Frank Watkins, and Laura Sill, respectively. All of these individuals previously worked on the Blue Man show at the Luxor. The specific duties and functions of HODs are discussed in detail below.

Excluding HODs, the Employer employs a total of five individuals in the electric department, four in the carpentry department, five in the property department, three in the audio department, two in the video department, and six in the wardrobe department. Additionally, the Employer employs five full-time “swings” who are not assigned to any particular department, but provide coverage in the different departments on an as-needed basis, and three undesignated regular part-time “subs” who substitute for employees during days off and vacations. As noted above, the Employer employs six MITs. Two MITs, one for percussion and one for string instruments, support the Monday, Tuesday, Saturday, and Sunday performances. Four MITs, two each for percussion and string instruments, support the shows that are scheduled Wednesday through Friday. In contrast to the stage crew members in other departments, MITs do not have swings and do not substitute for employees in other departments.

Many of the stage crew members are former employees of the Employer at the Luxor and other facilities. In order to fill its stage crew staffing needs at the Venetian, the Employer posted openings for certain stage crew positions at its various production locations, including at the Luxor. Pursuant to these postings, certain stage crew employees submitted resumes, were interviewed, and were hired by the Employer to work at the Venetian. Among all of the stage crew classifications, the MITs alone were not required to submit resumes or submit to interviews. The Employer merely transferred them from the Luxor to the Venetian.

⁴ Lea was replaced by Tim McDonald in January 2006.

B. Head of Departments' Duties and Responsibilities

1. Hiring, Discharges, Promotions, and Discipline

In connection with the hiring process at the Venetian, the Employer developed a checklist of points to review with all prospective stage crew members, including HODs. This checklist specifically noted that HODs were intended to be “leaders, administrators, and supervisors,” and that they would “hopefully [be] involved in the hiring of their staffs.” The record demonstrates that the Employer utilized a collaborative hiring process that generally included Prior, McInnis, Studer, and “only naturally” the HODs.

As HODs were hired, they began the process of staffing their respective departments. For example, Watkins, the video department HOD, recommended that Prior hire Ken Watkins to fill a vacant camera position. Based upon this recommendation, the Employer hired Ken Watkins. Similarly, during the technical set-up period when the Employer was moving into the Venetian theater, Studer asked Lea, the carpentry department HOD, for recommendations for load-in crew members. Lea recommended two people, Kenneth Liden and John “Vido” Azevedo, based on his view that they worked well with other crew members and had good welding, rigging, and carpentry skills. Studer, who lacks specific carpentry expertise, hired these two individuals based on this recommendation.⁵

HODs have continued to participate in the Employer’s hiring process after the Venetian opening. For example, Sill, the wardrobe department HOD, saw a need to hire additional employees in her department because costumes worn by three band members needed to be rebuilt. She discussed this need with Prior and electric department HOD Goldzweig. Subsequently, Studer gave Sill approximately ten resumes for her review. Sill then interviewed candidates she felt were qualified. Sill hired one candidate, Rebecca Roberts, on the spot, and then told Studer, who came in and met Roberts. Sill also recommended Kim Hamsher to Studer. After meeting Hamsher, Studer gave Sill the “go-ahead” to hire her.

Similarly, Goldzweig, the electric department HOD, interviewed Adam Bergeron for a spotlight operator position. After this interview, Goldzweig informed Prior that Bergeron “was our guy, let’s hire him.” Prior did so without independently interviewing Bergeron. Subsequently, when the Employer sought a “sub” spotlight operator, Goldzweig recommended Tim McGeorge to Studer. After speaking with McGeorge, Studer asked Goldzweig to interview him. Goldzweig did so, and McGeorge was hired. When the Employer created a new video swing position, Watkins went directly to Prior’s office and recommended Dan Tigh for the job. Prior accepted this recommendation and without a further interview hired Tigh.

HODs are involved in promotion and discharge decisions. For example, after being elevated to HOD of the carpentry department, Tim McDonald recommended promoting a sub,

⁵ In its post-hearing brief, Petitioner acknowledges that the Employer has accepted HODs’ hiring recommendations on several occasions, specifically because of “management’s lack of personal knowledge and experience in dealing with the work force in Las Vegas.”

Jimmy Cardinal, to a full-time position. Although Prior and Studer had reservations about this recommendation because Cardinal had some discipline and reliability issues, they deferred to McDonald after receiving McDonald's assurances that he could adequately supervise Cardinal.

Likewise, Vergot, HOD of the property department, advised Prior that one of the employees in his department, Heather Caliguire, could not adequately perform her job and that the Employer ought to look for a replacement. Based on Vergot's assessment, Prior discharged Caliguire, and then asked Vergot who should replace her. Vergot recommended Marielle "Apple" Thorn, whom the Employer ultimately hired.

HODs have participated in the disciplinary process. In particular, Koenig, the audio department HOD, observed one of his crew members, Scott Mullane, engage in inappropriate conduct during a performance. Koenig determined that the conduct was sufficiently severe to warrant reporting it to Prior. Prior and Koenig subsequently held a disciplinary meeting with Mullane, and Koenig expressly informed Mullane that his conduct was not acceptable.

2. Assignment and Direction of Work

HODs are responsible for creating the weekly schedule for their employees. The weekly schedule consists of performance calls and work calls. Performance calls are those times when stage crew members are present to assist with the show by performing a track specific to their department. Several people within a department are trained on a specific track to provide scheduling flexibility, and the HODs are required to make sure that there is coverage for each track. On the other hand, work calls are periods scheduled for routine maintenance and repair work. In addition to work calls for routine maintenance and repair, the HODs may schedule additional work calls when unexpected problems arise. Such a situation arose in March 2006, when Goldzweig determined that a problem existed with the Employer's light board. Without seeking authorization, he scheduled two electric crew members for an additional work call for purposes of repairing the light board. Once the HODs complete their schedules, they submit them to Studer, who checks for any conflicts with swing employee assignments and, barring none, incorporates the HODs' schedules into a master schedule.

The record also establishes that the HODs have the authority to determine whether overtime is necessary to complete their department's work calls and schedule up to five hours of overtime per employee for such work, without any prior approval from Studer or Prior. Moreover, the record establishes that the HODs have the authority to determine which crew members will receive overtime work, and do so based on their evaluations of each team member's particular skills and abilities. As for their own schedules, the record establishes that HODs can schedule, and in fact have scheduled, even greater amounts of overtime without prior approval.

HODs are also expected to schedule coverage in cases where employees are unexpectedly absent. For example, in December 2005, a number of employees in the property department called in sick. Vergot, without any input from Studer or Prior, scheduled other

employees to cover the sick employees' shifts. Similarly, HODs approve requests for days off. In one instance, an audio department employee asked his HOD, Koenig, to alter his regular day off. Koenig agreed without seeking permission from any of his superiors. Likewise, because he felt he needed to spend more hours at work during weekdays, Goldzweig reduced his own schedule from six to five days per week. He did so without seeking prior approval.

At the end of each week, stage crew members complete a timesheet, which is given to their respective HODs. The HODs review the timesheets for accuracy, sign the timesheets in the area designated for the supervisor, and submit them to Studer.

The record also reflects that HODs have participated in performance evaluations of employees in their departments. In particular, the Employer has conducted three-month "check-ins," or informal evaluation meetings, with all of its stage crew employees. These meetings have been conducted by Studer and the appropriate HOD, and the record reveals that the HODs have actively participated in the review. For example, during the check-in for carpentry department crew member Aaron Levy, carpentry department HOD Lea specifically addressed problems that he saw with Levy's job performance and his poor relations with other crew members. The Employer submitted evidence that it will perform more formal evaluations after one year of employment. The record reflects that it expects the HODs to fully participate in this process by completing evaluation forms, meeting with the employee, and recommending any increase in pay to Prior or Studer. In this regard, the Employer has informed HODs that they are to attend an in-house evaluation workshop to learn how to perform evaluations. At the time of the hearing, Sill was the only HOD to have attended this workshop.

3. Other Indicia

All HODs are paid \$28.00 per hour. Watkins also receives an additional \$250 per week to compensate him for his extensive body of knowledge with respect to repairing projectors and LED screens. HODs are required to attend HOD meetings conducted by Studer every Thursday in either the Employer's conference room or what is known as the "green room." These meetings are intended to provide the HODs with the opportunity to communicate amongst one another and coordinate the work of their departments. HODs are also required to attend other management meetings, such as management safety training and human resource training.

C. Work Duties and Compensation of Stage Crew Members, Wardrobe Employees, and MITs

The work performed by the stage crew members and MITs remained essentially the same after the move to the Venetian. During performances, the performers are supported by a "run crew," consisting of employees from the audio, carpentry, electric, property, video, and wardrobe departments. Each employee is assigned to work on a specific "track," a series of cues that must be executed with precision timing to ensure a consistent and safe performance.

The Employer employs a number of full-time “swing” crew members who learn several different tracks to help cover for absences and vacations by the various stage crew members.

MITs are also present during performances. Immediately before the show begins, MITs confer with the Employer’s stage managers regarding any changes to the show. They then speak with the band members to ensure that they have everything necessary for the show. MITs also maintain contact with a stage crew member in the audio department for a sound check and to tune the band members’ instruments. When the show starts, the MITs are stationed in a room adjacent to the band loft, where they can communicate with the band members in case problems arise, such as a broken drum head, amplifier, or microphone. After the introductory part of the show, the MITs switch the sound to the matrix and help the band members move to that area of the theater. The MITs remain in that area to provide assistance in case of any equipment failure. During the performances, the MITs are directly supervised by a stage manager. During non-performance periods, MITs report to McInnis.

During performances, all employees who are on stage, including any managers or supervisors who are present, are required to wear black cowls, coveralls, and gloves so that they cannot be seen.

Before each performance, all employees present, including managers, HODs, stage crew, and MITs, are expected to attend a “circle” meeting. The Employer considers the circle meeting to be an integral part of the show and a vital element of its core value of open communication. In these meetings, employees are asked to focus on the upcoming show. Some of the topics discussed include general announcements, changes to the show, and matters of personal interest.

During non-performance periods, stage crew members and MITs have set work calls during which they perform regular maintenance and repair work. These set work calls are supplemented by additional work calls to address unexpected problems that occur from time to time. MITs sometimes interact with crew members from the property and audio departments to tune and repair instruments. MITs perform their repairs in the instrument repair room, which contains workbenches, desks, and computers for their exclusive use. The MITs also use this room to change into their black cowls, coveralls, and gloves.

All stage crew members in the electric, carpentry, property, audio, video, and wardrobe departments are paid on an hourly basis, and their hourly rates, excluding HODs, range from \$24.00 to \$26.50. In contrast, the two full-time MITs are paid on a salaried basis.⁶ However, these two MITs, like the other stage crew members, also receive overtime after 40 hours in a workweek. Reduced to an hourly rate, these two employees’ compensation amounts to approximately \$24.57 to \$25.00 per hour. Three of the remaining four MITs earn \$18.00 per hour, while the fourth MIT earns \$22.15 per hour. All employees receive the same fringe benefits.

⁶ This salary is a holdover from the Luxor because all of the Employer’s full-time employees there were salaried. According to the Employer, this salary structure was maintained during the move for consistency purposes only.

Stage crew employees in the electric, carpentry, property, audio, video, and wardrobe departments report to their respective HODs, who in turn report to Studer. In contrast, and as noted above, during non-performance periods, MITs report directly to McInnis. The same reporting structure for MITs existed when the show was produced at the Luxor. Further, MITs and stage crew members have separate sign-in sheets.

D. Industry Standards

The record evidence includes a copy of the collective-bargaining agreement between the Musicians Union of Las Vegas, Local 369, American Federation of Musicians, AFL-CIO (the Musicians' Union), and Mare-Bear, Inc. d/b/a Stardust Resort and Casino for the period October 1, 1995 through September 30, 2000. This agreement defines bargaining unit employees as "all persons employed by the Employer to perform musical services." The Musicians' Union bylaws define its object as follows:

To unite into one labor organization the instrumentalists, arrangers, orchestrators, copyists, music proofreaders, music librarians, vocalists, dancers, support crew, or other individuals who render musical services of any kind within the Local's jurisdiction . . .

The record also includes copies of the collective-bargaining agreements covering several Las Vegas stage productions. These collective-bargaining agreements include stagehand heads of department in the bargaining unit. It is not apparent from these agreements or the record whether the recognition of these units was pursuant to a Board decision, direction of election, stipulated election agreement, or voluntary recognition.

E. Legal Analysis and Determination

The parties do not dispute that a unit consisting of all full and part-time stagehands and wardrobe employees constitute an appropriate collective-bargaining unit. Rather, they dispute whether HODs and MITs are properly included in such a unit. I will address these issues in order below.

1. HODs Are Statutory Supervisors

Section 2(11) of the Act defines the term "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

The possession of any one of these authorities is sufficient to deem the employee vested with such authority as a supervisor. *American Commercial Barge Line Co.*, 337

NLRB 1070 (2002); *Westwood Health Care Center*, 330 NLRB 935 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Allen Services Co.*, 314 NLRB 1060 (1994). Persons with the power “effectively to recommend” the actions described in Section 2(11) are supervisors within the statutory definition. *Sun Refining & Marketing Co.*, 301 NLRB 642, 649-650 (1991); *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972).

Although not dispositive of the issue of supervisory status, non-statutory indicia can be used as background evidence on the question of supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps.*, 323 NLRB 961, 963 fn. 9 (1997). As the Board has explained, nonstatutory indications of supervisory status, or “secondary indicia,” such as higher pay, supervisor to non-supervisor ratios, or attendance at supervisor meetings, may bolster evidence demonstrating that employees otherwise exercise one of the powers listed in the statute. See *Marian Manor for the Aged and Infirm*, 333 NLRB 1084 (2001); cf. *Ken-Crest Services*, 335 NLRB 777 (2001).

The burden of proving supervisory status is on the party that alleges that it exists. *St. Francis Medical Center West*, 323 NLRB 1046 (1997). Thus, the burden of establishing the HODs’ supervisory status lies with the Employer.

I conclude that the record establishes that HODs are supervisors within the meaning of Section 2(11) of the Act. In making this determination, I rely on several factors. First, there is ample record evidence that HODs take an active role in hiring employees, as demonstrated by Lea’s role in hiring Liden and Azevedo, Sill’s role in hiring Roberts and Hamsher, Goldzweig’s role in hiring Bergeron and McGeorge, and Watkin’s role in hiring Tigh. In its post-hearing brief, the Petitioner argued that, despite these examples, the HODs could not “effectively recommend” the hiring of employees because the Employer also rejected some of their recommendations. To begin with, the Board has held that an employer’s failure to follow all of an individual’s recommendations with respect to hiring does not negate the individual’s supervisory status. *Detroit College of Business*, 296 NLRB 318 (1989). In that case, the Board found that coordinators who participated in a joint hiring process with management, and recommended that candidates be hired, were supervisors even though some of their recommendations regarding hiring were not followed by the employer’s managers. See also *Venture Industries*, 327 NLRB 918, 919 (1999). Moreover, the record establishes that Studer lacked specific technical knowledge and, therefore, relied heavily on the HODs’ recommendations. In this regard, the Petitioner concedes in its post-hearing brief that the Employer accepted the HODs’ hiring recommendations on several occasions, specifically because of “management’s lack of personal knowledge and experience in dealing with the work force in Las Vegas.” Finally, the record contains examples of HODs’ hiring decisions with only minimal input from higher supervision, including Sill’s unilateral decision to hire Roberts.

Second, there is also ample record evidence that HODs are involved in promotion and discharge decisions, as demonstrated by McDonald’s convincing a reluctant Studer and Prior to promote Cardinal to a full-time position and by the Employer’s discharge of Caliguire, based on Vergot’s assessment of her skills. The record also reveals that HODs are involved in the discipline of their crew members, as reflected in the case where Koenig orally reprimanded Mullane for inappropriate conduct.

Third, the record demonstrates that HODs exercise substantial discretion to direct their crew members' work. This discretion extends to the HODs' authority to schedule their crews' work hours and days off. HODs also schedule employees for additional work outside of normal work call hours, and have the authority to schedule up to five hours of overtime per employee without checking with any higher authority.

Fourth, the record establishes that HODs have conducted performance evaluations of employees in their departments. Moreover, the record evidence establishes that HODs are expected to conduct employees' annual evaluations, upon which the Employer will base merit pay decisions. See *Sears Roebuck & Company*, 337 NLRB 443 (2002) (lead employee statutory supervisor where she approved overtime, granted time off, effectively recommended employees for hire, evaluated employees, approved time cards, and counseled employees).

Finally, there exist numerous secondary indicia which support my conclusion that HODs are supervisors within the meaning of Section 2(11). First, their compensation is uniformly greater than the employees they supervise. Second, the HODs attend management meetings, including weekly supervisor meetings with Studer and various other meetings relating to safety training and human resources. Finally, if HODs are found not to be supervisors, Studer would be responsible for directly supervising approximately 39 employees. In *Formco, Inc.*, 245 NLRB 127 (1979), the Board found a supervisor-employee ratio of 1:30 to be "disproportionate."

As for the Petitioner's contention that the industry's pattern of bargaining includes HODs in bargaining units, this factor fails to outweigh the significant record evidence in this case that the Employer, for institutional and cultural reasons, has established a supervisory structure that vests HODs with supervisory duties within the meaning of Section 2(11). Indeed, the record demonstrates that one of the reasons the Employer abandoned its venue at the Luxor was because it was not satisfied with the way things worked under the industry standard contract in place at the Venetian.

Accordingly, for the reasons set forth above, I shall exclude the HODs from the unit found appropriate herein, because they are statutory supervisors.

2. An Appropriate Unit Need Not Include MITs

Section 9(b) of the Act provides that "the Board shall decide in each case whether to assure to employees fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof." A union is not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 LRB 1103 (1962). Furthermore, in *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971), the Board explained that when no other labor organization is seeking a unit larger or smaller than the unit requested by the petitioner, the sole issue to be determined is whether the unit requested by the petitioner is an appropriate unit. In addition, the Board will "consider a petitioner's desires relevant,"

although this will “not, however, obviate the need to show [a sufficient] community of interest on the facts of the specific case.” *Airco, Inc.*, 372 NLRB 348 n.1 (1984).

The Board has historically found separate departmental units appropriate when there is no showing of a more comprehensive bargaining history, no other labor organization seeks to represent the same employees in a more comprehensive unit, and where it is established that the petitioned-for employees have a community of interest separate and apart from other employees. *Macy’s West, Inc.*, 327 NLRB 1222, 1228 (1999); *American Cyanamid Co.*, 131 NLRB 909 (1961). In determining whether the requisite community of interest among employees exists, the Board looks to such factors as a common interest in wages, hours, and other working conditions; common supervision; degrees of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Franklin Mint Corp.*, 254 NLRB 714, 716 (1981). Moreover, the Board will find employees to be an appropriate unit, despite some degree of functional integration, where the employees are separately supervised, possess skills unique to their classification, receive the highest hourly wage, are assigned work in a different manner, and where transfers are infrequent. See *Ore-Ida Foods*, 313 NLRB 1016, 1019 n.3 (1994).

In the present case, there is no showing of a bargaining history involving a more comprehensive unit of stage crew members and MITs. On the contrary, although the Employer was not a party to the agreement in effect at the Venetian, that agreement did not include MITs. Likewise, in the present case, no other labor organization has come forward to represent a unit that includes both stage crew members and MITs.

The record also establishes that the petitioned-for unit, which excludes MITs, is an appropriate unit for collective bargaining. In this regard, I note that the parties have never contended that the employees in the petitioned-for unit do not share a community of interest. The record establishes that they do. Stage crew members have the same direct supervisor, Studer; they are all paid \$24.00 to \$26.00 per hour; they receive the same fringe benefits; they work together in an integrated fashion to support all aspects of the Blue Man performance; there is interchange to the extent that subs perform work across department lines; and they have a history of bargaining.

Moreover, the record establishes that the stage crew members and wardrobe employees have a community of interest that is significantly distinct from the MITs. In this regard, I first note that the two groups have different supervision. MITs are directly supervised by the Production Manager, McInnis. In contrast, the stage crew members are directly supervised by their HODs, who, in turn, are directly supervised by the Technical Supervisor, Studer. Additionally, the record establishes that MITs generally have musical backgrounds with skills separate from the other stage crew members. As a result, MITs do not have any interchange with other stage crew members; have entirely separate subs; do not “swing” to other stage crew positions; and work in different areas than the other stage crew members, specifically, the instrument repair room, which houses their specialized equipment. MITs also work on different cue tracks during the shows than stage crew members, and spend most of their time in the same area as the band musicians, ready to assist the musicians in case of emergency or instrument malfunction. Thus, it appears that most of the MITs’ interactions

with other employees are with musicians, not stage crew members. Lastly, the record establishes that MITs are paid differently from stage crew employees. The full-time MITs are paid on a salary basis, while the part-time MITs are paid on an hourly basis at a rate that is substantially less than the employees in the petitioned-for unit.

Thus, based on the record as a whole, I find that the stage crew members and wardrobe employees in the petitioned-for unit constitute a distinct and appropriate unit separate and apart from the MITs. I also find that, if excluded from the petitioned-for unit, the MITs could conceivably obtain representation in their own unit or in conjunction with a larger musicians unit. In this regard, I note that the MITs' work is strongly integrated with the musicians where their sole job duties are to repair and maintain the musicians' instruments and to attend to the specific needs of the musicians during the shows. Further, I note that the record includes evidence of industry practice relating to MITs. While this practice does not show that MITs are always excluded from a unit of stagehands and wardrobe employees, it does reflect that they have in the past been included as part of a musicians' unit. This evidence also reflects that the Musicians' Union could very well seek to represent MITs.

The Board's decision in *The Lundy Packing Company, Inc.*, 314 NLRB 1042 (1994), supports this result. In *Lundy Packing*, the union sought a unit of production and maintenance employees at a pork processing facility. The Regional Director held that the petitioned-for unit also had to include quality assurance/lab technicians and certain other employees because these employees were integral to the production process and shared a community of interest with the production employees. The Board reversed. In doing so, the Board instructed that a "petitioned-for unit need only be *an* appropriate unit for purposes of collective bargaining, not the most appropriate unit," and that "in representation proceedings, the unit sought by the petitioner is always a relevant consideration." *Id.* at 1043 (emphasis in original).

Applying these principles, the Board then found that the quality assurance/lab technicians and other employees did "not share such an overwhelming community of interest with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioner's objections." *Id.* The factors the Board relied on in finding the less inclusive unit appropriate, which are also present in this case, include separate supervision, different pay, and lack of interchange. Notably, the Board recognized that a unit including the quality assurance/lab technicians and other employees "might also have been appropriate had such a unit been sought by Petitioner," where the two groups each performed production-related functions, worked alongside one another, received similar benefits and holidays, and were not required to have any special education or training. *Id.* However, because the union did not seek such a broader unit, these factors were insufficient to mandate the inclusion of these other employees in the petitioned-for unit.

Recent Board cases dealing with truck drivers and mechanics, which I believe are analogous to the instant matter, also support this result. For example, in *Overnite Transportation Company*, 322 NLRB 347 (1996), affirmed 322 NLRB 723 (1996) (denial of the employer's motion for reconsideration), the Board reversed the Regional Director's determination that mechanics shared such a close community of interest with drivers so as to require their inclusion in the petitioned-for unit. While the evidence indicated that mechanics

shared a sufficient community of interest to be included in the unit had the petitioner sought them, the Board found that the failure to include the mechanics did not render the drivers-only unit inappropriate where there existed separate supervision, mechanics possessed special skills, and there was no regular interchange. See also *Overnite Transportation Company*, 325 NLRB 612 (1998); *Laidlaw Waste Systems*, 299 NLRB No. 124 (1990).

Accordingly, for the reasons set forth above, I shall exclude the MITs from the unit found appropriate herein.

In sum, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time stagehands and wardrobe employees.

Excluded: All other employees, office-clerical employees, guards, heads of departments, and other supervisors as defined in the Act.

There are approximately 33 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election, which will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated

before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

**INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES AND ITS TERRITORIES AND CANADA, LOCAL 720, AFL-CIO**

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the National Labor Relations Board Resident Office, 600 Las Vegas Boulevard, S., Suite 400, Las Vegas, Nevada, 89101-6637, on or before May 5, 2006. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The Board in Washington must receive this request by May 12, 2006. A copy of the request for review should also be served on the undersigned.

Dated at Phoenix, Arizona, this 28th day of April 2006.

/s/Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28